NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
APPELLATE GOVERNMENT DIVISION
CAAF & CCA CASE LAW UPDATE

21 April 2000

PRETRIAL MATTERS

A. JURISDICTION

1. Legal Hold Letter Sufficient to Confer Jurisdiction.

United States v. Williams, 51 M.J. 592 (N.M.Ct.Crim.App. 1999).

Facts: Williams pled guilty to numerous forgery type offenses. During the providence inquiry, Williams admitted he was "currently on active duty" in the U.S. Marine Corps and had never been "discharged or released from active service." On appeal he claimed the court-martial lacked personal jurisdiction over him because he had been medically discharged prior to his court-martial. Williams was put on legal hold on the same day he received his DD214 at home. Williams claimed that the legal hold letter purporting to hold him past his discharge was fraudulently generated by the command in order to illegally court-martial him. In a second assignment of error, Williams claimed he was subject to "ineffective assistance of counsel *per se*" because his individual civilian defense counsel was not active status in any state in which he was licensed to practice law.

Held: Noting that no evidence supported the allegation that the legal hold letter was fraudulently prepared, the Court found that court-martial jurisdiction over appellant attached and was never terminated. The Court noted that the legal hold letter was effective when signed and voided appellant's DD214 before the discharge became effective. Thus, the erroneous delivery of the otherwise valid discharge certificate previously revoked did not terminate court-martial jurisdiction over appellant. The Court determined that a post-trial *DuBay* hearing was not required because all the post-trial submissions could be read together and reconciled. Affirmed.

Ineffective Assistance of Counsel. As to the second issue, the court held RCM 502(d)(3)(A) simply requires that a defense counsel must be a "member of the bar of a Federal court or the bar of the highest court of a State." The court noted that the rule specifies no additional requirement that the practitioner must be able to practice in his home state. Accordingly, the court refused to adopt Williams's prejudice *per se* argument because they found "no scintilla of evidence that counsel here did not effectively represent appellant's interests."
Note: CAAF granted petition on this case, oral argument was held on 4 April 2000-- decision pending.

B. SEARCH AND SEIZURE

1. No Reasonable Expectation of Privacy in E-Mail Box On Shared Server.

United States v. Monroe, 52 M.J. 326 (2000)

Facts: Monroe was convicted of possession of child pornography. Monroe was stationed at Osan Air Force Base and had access to a computer owned by the U.S. Air Force. The computer allowed access to the internet by way of a private password. Servicemembers assigned to Osan were allowed to send and receive textual and morale messages from friends and family. From time to time, messages that were too long or defective would get stuck in the server that would cause it to run at a much slower rate. As part of routine maintenance, the system administrator found that 59 messages had been stuck on the server. Some of the messages were entitled "erotica" or "sex" and sent from internet newsgroups to Monroe's account. The system administrator found that some of these messages contained graphic image files of adult pornography. The system administrator contacted OSI. OSI requested search authorization of Monroe's room for computer related evidence. The search yielded 218 floppy discs. Three of the graphic files seized contained child pornography. Monroe pled guilty conditionally to possession of three or more images of child pornography under 18 USC § 2252(a). The conditional pleas of guilty preserved his suppression motion that challenged the search of the computer. First he argued that he had a expectation of privacy in his e-mail box on the USAF computer. Second, he argued that the search authorization was deficient in its probable cause determination because the OSI agent's conclusory opinion that the pictures were obscene was not sufficient to constitute probable cause.

Held: CAAF held 5-0 that as to the first issue, Monroe did not have a reasonable expectation of privacy in his e-mail box at least from personnel charged with maintaining the server. Thus, the system administrator's opening of Monroe's e-mail messages did not constitute a search. As to the second issue, CAAF chided the OSI for preparing a weak affidavit, but nevertheless found it to be minimally sufficient to constitute probable cause because obscene pictures speak for themselves. At any rate, even if the affidavit was lacking, the agents had a good faith basis for executing the search. Affirmed.

C. WIRETAPS

1. No Prohibition For SecNav To Delegate Wiretap Approval To Dep GC.

United States v. Guzman, 52 M.J. 318 (2000)

Facts: NCIS targeted Guzman as a suspect and asked one of Guzman's acquaintances, YN3 Moreno, to consent to a wiretap of his phone conversations with Guzman. NCIS then requested the General Counsel of the Navy to approve the wiretap. The matter was referred to the Deputy General Counsel of the Navy, who authorized the wiretap. The Secretary of the Navy had delegated the authority to approve wiretaps to the Deputy General Counsel of the Navy. However, DoD Directive 5200.24 stated that the approval authority for wiretaps should not be delegated to an official below Assistant Secretary or Assistant to the Secretary of a military department. On appeal, Guzman argued that the Deputy General Counsel of the Navy was an inappropriate approval authority and the SecNav lacked the authority to delegate wiretap approval to a Deputy General Counsel even though he was appointed "an Assistant to the Secretary of the Navy with respect to consensual interceptions of wire and oral communications." Guzman argued that the results of the wiretap should have been suppressed due to the improper delegation.

Held: Use of wiretap evidence is governed by Mil.R.Evid. 317. CAAF held that there was no prohibition to appointing the Deputy General Counsel of the Navy as an assistant secretary for purposes of approving wiretaps, and even if SecNav lacked that power, neither the Constitution or an Act of Congress requires that official action be secured before conversations are overheard or recorded by Government agents. Thus, Guzman, even if the delegation was improper, had no constitutional right to a proper approval authority delegation. Affirmed.

D. REFERRAL AND ARRAIGNMENT

1. Personal Selection Of Enlisted Members Not Jurisdictional Error.

United States v. Townes, 52 M.J. 275 (2000)

Facts: At his first Article 39(a) session on 10 February 1993, Townes was advised of his rights concerning trial by court-martial composed of officer and enlisted members and trial by military judge alone. Townes stated that he understood his rights. On 24 March 1993, the military judge and trial defense counsel discussed a written request by Townes for trial by officer and enlisted members. The request was not signed by Townes. A few days later, trial defense counsel informed the military judge that Townes made a "formal election for officer and enlisted members." Eight members heard a 10-day contested case; Townes testified an entire day and was present for the entire trial. Four years later the Navy-Marine Corps Court of Criminal Appeals ordered a post-trial *DuBay* hearing to inquire into the fact of whether Townes had **personally** requested

trial by officer and enlisted members. During the post-trial hearing, Townes stated that he did not know and did not remember. Based on the findings of the *DuBay* hearing, the Navy-Marine Corps Court of Criminal Appeals reversed the conviction because there was neither a **personal** oral request nor a written request by Townes to be tried by officer and enlisted members in accordance with UCMJ, Article 25(c)(1). The Judge Advocate General certified to CAAF the question of whether Townes's failure to personally request trial by officer and enlisted members was jurisdictional error or procedural error that should be tested for substantial compliance.

Held: CAAF held that although it was error for not securing Townes's personal selection, either oral or written, that he wanted to be tried by officer and enlisted members, the error was not jurisdictional. Instead CAAF ruled that the error was procedural and because Townes was present during the entire trial, he was not prejudiced by the error. Based on this, CAAF reversed the NMCCA decision and remanded the case back to the lower court for disposition of the remaining issues.

TRIAL MATTERS

A. ATTORNEY-CLIENT ISSUES

1. Since Ongoing Attorney-Client Relationship Was Not Established, Release From Active Duty Constituted Good Cause For Severance.

United States v. Spriggs, 52 M.J. 235 (2000)

Facts: Army Captain Maus represented Spriggs at a prior court-martial where Spriggs had been acquitted. Spriggs was again identified as a suspect. Spriggs spoke on the phone with CPT Maus on several occasions regarding the charges he faced at his second court-martial including a count of perjury from the prior court-martial. Spriggs asked CPT Maus if he would represent him to which CPT Maus stated that he would if he could. At the time of these phone conversations with Spriggs, CPT Maus was on terminal leave working for a civilian law firm.

Spriggs was apprehended on 24 May 1996. Since, CPT Maus was on terminal leave so a CPT Novak represented Spriggs at the IRO hearing. On 24 June 1996, CPT Maus was released from active duty. At Sprigg's court-martial, he asked to be represented by CPT Novak and as IMC asked for CPT Maus. The request for CPT Maus was forwarded to the reserve commander at the Army Reserve Personnel Center. CPT Maus was contacted and he indicated that he was not willing to absent himself from his private law firm. Accordingly, the reserve commander denied the IMC request. On appeal, Spriggs argued that the military judge improperly severed the attorney-client relationship between him and CPT Maus and that the Army Court of Criminal Appeals erred by shifting the burden to Spriggs to prove that he had an ongoing attorney-client

relationship with CPT Maus. Spriggs also argued that the Army Court erred when it held that release from active duty *per se* terminates the attorney-client relationship.

Held: CAAF held that Spriggs had not met the threshold burden of proving whether he had an ongoing attorney-client relationship with CPT Maus. Because he did not prove an ongoing attorney-client relationship with CPT Maus, Maus's release from active duty constituted good cause for severing the relationship. CAAF left open the question of whether release from active duty would under all circumstances terminate the attorney-client relationship. Affirmed.

B. VOIR DIRE

1. Peremptory Challenge Must Be Race Neutral Of Any Minority Member.

United States v. Hurn, 52 M.J. 629 (N.M.Ct.Crim.App. 1999)

Facts: Hurn was convicted of rape and forcible sodomy of a child under 16 years of age, larceny of a car, four specifications of assault on a child under 16 years of age and indecent acts with a child under 16. Hurn was sentenced to confinement for life. On appeal, Hurn raised many errors, six of which NMCCA discussed. Specifically, Hurn argued that the military judge erred in not requiring trial counsel to give a race neutral reason for a peremptory challenge; that the evidence was factually insufficient to convict him; that the sentence was inappropriately severe; that the military judge erred when he denied Hurn's request for a mitigation expert; that the SJA erred by not commenting on Hurn's legal allegation of error with regard to the denial of a mitigation expert; that the military judge erred by not instructing the members that "personality disorder" could constitute a severe mental disease of defect.

Held: Peremptory challenge: Hurn had selected officer and enlisted members. Hurn is African-American. Hurn's panel originally consisted of 10 members. At the time of the peremptory challenge, eight members were left, five officer and three enlisted. Trial counsel peremptorily challenged LtCol Ayala, the only minority member (Hispanic) of the panel. Defense counsel objected and asked the trial counsel articulate a race neutral reason for challenging LtCol Ayala. The trial counsel responded that he challenged LtCol Ayala to protect the panel for quorum. The military judge accepted that reason. On appeal, the court held that it was error for the military judge to accept that reason as a race neutral reason for challenging LtCol Ayala. The Court reasoned that the military judge had to ascertain further regarding this challenge because if this was the reason, trial counsel could just as easily challenged one of the remaining four Caucasian officer members. Trial counsel filed a post-trial affidavit, which Hurn did not contest. Trial counsel stated in his affidavit that he challenged LtCol Ayala based on his [trial counsel's] personal knowledge of LtCol Ayala's heavy workload. NMCCA accepted this as a legitimate race neutral reason.

Factual Sufficiency and Sentence Appropriateness: The Court found that the evidence was clearly sufficient to convict Hurn. The Court also found that although confinement for life was harsh, what Hurn did was particularly heinous, rape of a 14-year-old stepdaughter over a period of six months. He sexually abused her about 33 times. Additionally, a child psychologist testified that the victim was traumatized by the abuse and suffered from PTSD.

Denial of Mitigation Expert: The military judge denied the request for a mitigation expert concluding that defense counsel had had over six months to prepare for trial. The Court reviewed the entire record and concluded that Hurn had not made the requisite showing to entitle him to an expert under RCM 703.

Staff Judge Advocate Recommendation: The Court ruled that the SJA clearly erred by failing to comment on the allegation of legal error, but since the military judge correctly denied the request for a mitigation expert, the SJA's failure to comment did not prejudice Hurn.

Mental Defect Instruction: Because Hurn did not object to the instruction the Court tested the error for plain error. The Court concluded that a personality disorder does not constitute a severe mental disease or defect as a matter of law. Accordingly, the NMCCA found no plain error. Affirmed.

C. PRETRIAL MOTIONS AND OTHER MATTERS

1. Military Judge Abused Discretion By Closing Courtroom.

United States v. Terry, 52 M.J. 574 (N.M.Ct.Crim.App. 1999)

Facts: When the alleged rape-victim, a 20-year old active duty servicemember, was called to testify, the trial counsel asked the military judge to clear the courtroom because the victim would be more comfortable not having to testify in front of a packed courtroom. The defense objected on First and Sixth Amendment grounds. The military judge granted the motion and cleared the courtroom.

Held: The Navy-Marine Corps Court held that the military judge abused his discretion in clearing the courtroom. Exclusion of court spectators is allowed but must be used sparingly and the Government must demonstrate a compelling need. The Court ruled that the military judge cleared the courtroom without an adequate factual basis to do so. This exclusion of spectators violated Terry's Sixth Amendment right to a public trial. Findings and Sentence set aside.

2. Multiplicity -- Drug Possession Is LIO Of Drug Distribution.

United States v. Scalarone, 52 M.J. 539 (N.M.Ct.Crim.App. 1999)

Facts: Scalarone was convicted, pursuant to his pleas, of conspiring to possess and distribute psilocybin mushrooms, and five specifications of drug use. He was sentenced to 25 years confinement, total forfeitures, reduction to E-1, a dishonorable discharge, and a $5000 fine, with a fine enforcement provision of an extra year of confinement if the fine was not paid. The convening authority suspended confinement in excess of 8 years for 12 months. Although the pretrial agreement required the suspension of confinement in excess of 7 years, an extra year was added when appellant failed to pay the fine.

The possession and distribution offenses arose from Scalarone driving from MCAS Yuma to San Francisco to buy psilocybin mushrooms and then returning to Yuma distribute the mushrooms to his co-conspirator. Each purchase was made with the intent to distribute mushrooms to the co-conspirator and the mushrooms were kept only as long as was necessary to take the mushrooms from San Francisco to Yuma.

Scalarone was held in pretrial confinement for almost three months, where he was held in "special quarters" because he was a flight risk based on the length of sentence he could receive. He could make phone calls or have visitors, as a matter of policy. He was segregated from other prisoners and remained in his cell for 23 hours per day. When out of his cell, he was place in leg and hand restraints. Because Scalarone did not raise the issue of unlawful pretrial punishment, the facts were adduced through affidavits filed at the appellate court. On appeal, he also challenged the conditions of his post-trial confinement. Scalarone also alleged ineffective assistance of counsel [IAC] based upon his counsel allowing him to plead to multiplicious charges, his failure to determine whether the convening authority could add confinement above that provided for by the pretrial agreement, and the lack of sentencing evidence presented.

Held: Under *United States v. Savage*, 50 M.J. 244 (1999), distribution necessarily includes possession with intent to distribute. Thus, these specifications are multiplicious, even though the issue was not raised at trial.

The court found error as to the convening authority action in exceeding the pretrial agreement based on appellant's failure to pay the fine. The pretrial agreement placed a ceiling on confinement. The convening authority could not exceed that ceiling.

The court found no merit in Scalarone's IAC claim. The court noted that as to the multiplicity issue and additional confinement, he had suffered no prejudice since the issues had been resolved in his favor. As to the sentencing case, the court noted that defense counsel affidavit rebutted any claim of IAC and effectively explained why the case was presented in the manner it was.

The Court awarded 87 days confinement credit for illegal pretrial confinement. Although the issue was not raised at trial, the court felt bound by *United States v. Huffman*, which provides that the issue is not waived if not raised at trial. Therefore, based on the affidavits presented, the court found that UCMJ, Article 13 had been violated. However, no relief was granted as to Scalarone's claim regarding post-trial confinement. Although the Government asserted that the court lacked jurisdiction to address the issue, the court found that since his claim was based upon actions taken prior to the convening authority taking his action, it could decide the issue. Having done so, it found no violation of Article 13.

The Judge Advocate General has certified the question of whether a failure to raise an Article 13 violation at trial waives the issue. CAAF heard oral argument on 1 March 2000. Decision from CAAF is pending.

D. MILITARY JUDGE IMPARTIALITY.

1. Tough Questions Of Accused Did Not Divest MJ Of Impartiality.

United States v. Burton, 52 M.J. 218 (2000)

Facts: Burton, a Marine Corps staff sergeant, pled guilty to wrongful use of cocaine. During the sentencing hearing, Burton made a sworn statement, imploring the military judge that he not award a punitive discharge. Burton argued that he had 10 years of outstanding service. During cross-examination trial counsel brought out the fact that Burton was a career planner and that he had worked as a corrections NCO in the Camp Lejeune brig. The military judge followed-up on Burton's testimony that he had working in the brig; he challenged Burton to explain why he should be given any leniency when PFCs and lance corporals are punitively discharged for cocaine use. The military judge continued his questioning of Burton and asked him what kind of message it would send if he did not award Burton a discharge in light of the fact that young Marines are discharged for the same offense. The military judge sentenced Burton to a punitive discharge and Burton appealed arguing that the military judge was improperly predisposed to adjudge a punitive discharge and should have disqualified himself.

Held: CAAF noted that a military judge has a wide latitude to ask questions. Additionally, CAAF ruled that although a "biased or inflexible judge is disqualified, a tough judge is not." Since Burton never complained at trial about the bias of the military judge, and it was not improper for the military judge to ask Burton to reconcile the implication of his escaping a punitive discharge: the creation of a double standard, one for staff noncommissioned officers and one for Marines of lesser grade. In light of this, CAAF held that a reasonable person would not doubt the impartiality of this military judge. Affirmed.

E. RULES OF EVIDENCE

1. Mil.R.Evid. 312(f) Does Not Apply To Members On TDRL.

United States v. Stevenson, 52 M.J. 504 (N.M.Ct.Crim.App. 1999)

Facts: Stevenson, a Sailor, was transferred to the Temporary Disability Retired List [TDRL]. As a member of the TDRL, Stevenson was receiving regular treatment at the Veteran's Administration Hospital in Memphis for diabetes, which included having his blood drawn on a regular basis. While in the TDRL status, Stevenson become a suspect of a rape that occurred while he was on active duty. NCIS agents asked employees at the VA to notify them the next time Stevenson's blood was being drawn. When Stevenson reported for treatment at the VA, medical personnel inserted a needle into his arm, and drew blood that was required for diabetes screening. After obtaining a sample for the diabetes screening and while the needle remained inserted in Stevenson's arm, medical personnel obtained a second tube of blood. NCIS was later notified to come and pick up the second tube of blood. A DNA test of Stevenson's blood matched the semen sample from the rape kit.

The Government planned to introduce the blood sample under Mil.R.Evid. 312(f), the medical purpose exception to the warrant requirement, since the blood was obtained while the needle was already inserted in appellant's arm for a valid medical purpose. However, the military trial judge suppressed the sample and held that insertion of the needle in Stevenson's arm lasted longer than was necessary for the diabetes screening and was therefore an additional intrusion not covered under Mil.R.Evid. 312(f). Therefore, the military judge found that the second tube of blood was the fruit of an unlawful search and seizure under the Fourth Amendment. The Government appealed the ruling and argued that since the needle was already inserted into appellant's arm when the second tube of blood was drawn, there was no intrusion beyond the one already made for a valid medical purpose.

Held: The plain language of Mil.R.Evid. 312(f) does not limit its applicability to active duty servicemembers. Nevertheless, applying Mil.R.Evid. 312(f) to Stevenson was unreasonable under the Fourth Amendment because 1) the armed forces do no rely upon members of the TDRL to carry-out their mission even though they remain servicemembers and are subject to both the UCMJ and trial by court-martial; 2) the armed forces do not have the same need to be able to take actions necessary to preserve the health of members of the TDRL as they have for active duty; 3) members of the TDRL are not subject to involuntary medical treatment; and 4) there is no showing that the application of MRE 312(f) to the TDRL is a needed exception based upon military exigencies. Since the court found that Mil.R.Evid. 312(f) did not apply to Stevenson, it did not decide the issue of whether the evidence would have been admissible under Mil.R.Evid. 312(f). JAG certified the case on the question of whether

Mil.R.Evid 312(f) applies to service members on TDRL. Pending review at the CAAF with oral arguments scheduled on May 2, 2000.

2. Proper Use of Mil.R.Evid. 404(b) For Prior Positive Urinalysis.

United States v. Roberts, 52 M.J. 333 (2000)

Facts: Roberts pled guilty to unauthorized absence and contested the charge of wrongful use of methamphetamine. Roberts took the stand and asserted that somebody had slipped him some drugs at a party. Roberts received NJP six months earlier for testing positive for cocaine, and although punishment was imposed, the GCMCA set aside the NJP because of a defective chain of custody of the urine sample. At that NJP, Roberts told the NJP authority that someone had put drugs in his food. Trial counsel offered the evidence of that positive urinalysis. The military judge ruled that this evidence was admissible as impeachment evidence and admissible under Mil.R.Evid. 404(b). During cross-examination, Roberts admitted that he had tested positive for cocaine and that he had claimed at the NJP that someone put the drugs in his food.

Held: CAAF held 5-0 that the evidence in this case was proper rebuttal because it was probative under 404(b) as a variation of the "lightning-doesn't-strike-twice" theory. After distinguishing this case from *United States v. Graham* (50 M.J. 56), CAAF held that even if the admission of the evidence was error, it did not prejudice Roberts because he made damaging admissions prior to trial regarding his drug use. Affirmed.

3 Loss of Money In Unrelated Case Admissible Under 404(b) For Motive.

United States v. Smith, 52 M.J. 337 (2000)

Facts: Smith was convicted of making a false official statement and larceny. Smith was charged with stealing money from a fellow service member, Airman First Class M. Fryling. Trial counsel offered evidence that Smith was unable to account for money that his roommate Airman First Class Giznik had placed in his [Smith's] custody for payment of the phone bill. When Giznik confronted Smith, Smith said that he would get the money later. Later that afternoon, Smith, without giving any explanation, produced the money for the phone bill. The military judge found that the evidence was admissible under Mil.R.Evid 404(b) to show motive on the part of Smith for stealing money from Fryling's account by use of Fryling's ATM card.

Held: On appeal, Smith argued that the military judge abused his discretion in admitting the evidence because it was not probative and highly prejudicial. After a lengthy discussion of Mil.R.Evid. 404(b) CAAF concluded that the evidence was highly probative on the issue of Smith's timely motivation for

committing the Fryling larceny. Additionally, CAAF found that other evidence supported the fact that appellant had taken money from Fryling by use of Fryling's ATM card. So even if the admission of Giznick's was error, it did not prejudice Smith. Affirmed.

4. Homosexual Relationship Admissible To Show Sham Marriage.

United States v. Phillips, 52 M.J. 268 (2000)

Facts: Phillips was charged with BAQ/VHA fraud. The Government's theory was that Phillips wanted to move off base in order to collect BAQ/VHA and to continue a homosexual relationship. After his request to move off base was denied, Phillips married Lori Lussier. The central issue in the case was the Government's theory that Phillips's marriage to Lussier was a sham. The Government sought to introduce evidence of Phillips's homosexual orientation to rebut his claim that he and Lussier held themselves out as a traditional married couple. Defense objected on Mil.R.Evid. 403 grounds that the evidence of homosexual orientation was not probative and if probative, too prejudicial. The military judge found evidence of Phillips's homosexual orientation to be admissible for the limited purpose of rebutting the claim that Phillips's marriage was of the traditional kind.

Held: CAAF held 3-2 that the evidence was admissible under Mil.R.Evid. 404(b) to rebut Phillips's claim that his marriage to Lussier was a sham. CAAF found that the evidence of his prior homosexual relationships with two service members made it more probable that Phillips and Lussier did not intend to live as man and wife. Affirmed.

5. VTC Violated Confrontation Rights Where Unidentified Third Person Apparently Coached Witness.

United States v. Shabazz, 52 M.J.585 (N.M.Ct.Crim.App. 1999).

Facts: MW, the civilian wife of a Marine stationed in Okinawa witnessed a beating outside a nightclub in Okinawa, Japan in which another American civilian, PH, was punched and kicked in the head and severely brain damaged. Shabazz, who admitted to being present the night of the maiming, denied participating in the beating. MW was the key Government witness who stated that she actually saw Shabazz kick PH. By the time Shabazz was brought to trial, MW was no longer in Okinawa, but in Camp Pendleton. Since the trial was in Okinawa and MW was a civilian, the military had no ability to subpoena her presence in Japan. There was also no prior sworn testimony of MW because she had not testified at the Article 32 hearing. Nevertheless, MW agreed to appear voluntarily and the Government arranged for her travel to Okinawa. However, just as the trial was beginning, MW's husband notified the Government that MW refused to come to

Okinawa.

The Government then sought to have MW testify via a video teleconference [VTC]. The defense objected. The MJ allowed MW ŝ testimony, finding that her unavailability as a witness was a sufficient necessity to dispense with face-to-face confrontation. MW testified via VTC and Shabazz was convicted of maiming PH. During her testimony, the participants in Okinawa could only see MW and were unable to see if there was anyone else present at the VTC site. There was also no record made of the parties present at the VTC site and no video tape recording was made of the VTC testimony. There were also technical difficulties and interruptions during MW ŝ testimony.

Defense counsel requested a post-trial Article 39(a) in which he moved to strike MW ŝ testimony. Defense counsel based his motion on the fact that the trial transcript revealed that an unidentified male voice had been coaching MW during her VTC cross-examination. The military judge found that what the voice was saying was not substantive and therefore was harmless beyond a reasonable doubt. On appeal, Shabazz argued that VTC, when dealing with adult witnesses, in and of itself, violates the 6th Amendment right to face-to-face confrontation and that such alternatives to in-court testimony should be limited to child witnesses. He further argued that the MJ abused his discretion in not striking MW ŝ testimony once it became apparent she had been coached.

Held: Shabazz ŝ 6th amendment right to confront MW was violated when the military judge failed to ensure the reliability of her testimony where he: 1) did not establishing control over the VTC site; 2) after learning of the unidentified voice, did not conduct an inquiry into the circumstances surrounding MW ŝ testimony; and 3) erred when he concluded that the witness and the third party did not discuss substantive matters. The Court set aside the maiming charge and returned the case for a rehearing.

The Court found a 6th Amendment violation in this case based on the way the VTC was conducted but did not hold that VTC is *per se* unconstitutional. The Court also provided, in an appendix, an example of procedures to be used for VTC testimony. These procedures include provisions for a studio courtroom clerk and identifying all parties that are present before the witness testifies.

6. Failure To Object To Hearsay Forfeited Issue On Appeal.

United States v. Cardreon, 52 M.J. 213 (2000)

Facts: Cardreon was charged with rape of TM2 K. Cardreon's theory was that the sex was consensual. Immediately after the rape, TM2 K told Gunner's Mate Smith that she had been raped. Trial defense counsel made a motion *in limine* to preclude trial counsel from mentioning **in his opening statement** TM2 K's fresh complaint rape allegation to Smith because he argued that it would be

impermissible hearsay for Smith to testify as to what TM2 K told him. Trial defense counsel asserted that it might become relevant as a prior consistent statement under 801(d)(1)(B). The military judge overruled the objection and allowed trial counsel to mention it during opening statement. After trial defense counsel cross-examined TM2 K by impeaching her credibility, Smith testified that TM2 K was crying and shaking when she told him that Cardreon had raped her. Trial defense counsel did not object to this evidence. On appeal, Cardreon argued that the military judge committed plain error by admitting TM2 K's statement to Smith as it did not qualify as a prior consistent statement under Mil.R.Evid. 801(d)(1)(B) because the statement was made after TM2 K had a motive to fabricate. On appeal, Cardreon's theory was that TM2 K already had a motive to fabricate in that Smith was her boyfriend to whom she became subsequently engaged.

Held: By failing to object in a timely manner, Cardreon's claim was forfeited in the absence of plain error. *See* Mil.R.Evid. 103(a)(1). Because there was no objection, CAAF held that there was not enough in the record to make a determination whether the evidence would have been admissible. CAAF noted that the evidence could have been admissible under 803(1) or 803(s) as a present sense impression or an excited utterance, but since no objection was lodged, there was nothing in the record for the military judge upon which to rule. Accordingly, CAAF held that Cardreon had failed to carry his burden of establishing error. Affirmed.

7. Writing As Adoptive Admission Under Mil.R.Evid. 801(d)(2)(B).

United States v. Hood, 52 M.J. 582 (N.M.Ct.Crim.App.1999).

Facts: Contrary to his pleas, Hood was convicted of obtaining services under false pretenses by making long distance phone calls using the personal security code of a friend in the barracks. The victim's phone bill showed that the calls had been made from Hood's phone number. When the victim presented the phone bill to Hood he admitted making the calls in question and offered to pay for them. The Government then admitted the phone bill itself as an adoptive admission.

Held: The Court held that the military judge did not abuse his discretion by admitting over defense's hearsay objection the telephone bill under Mil.R.Evid. 801(d)(2)(B) as an adoptive admission. The Court reasoned that although Mil.R.Evid. 801(d)(2)(B) normally refers to verbal statements, "there is nothing that would limit its applicability to an written statement." The Court also held that the evidence was legally and factually sufficient to convict appellant and that a $1000 fine was not inappropriately severe. The Court noted that even though the amount of the fine was more than the amount of the unjust enrichment, the fine was still within the jurisdictional limits of the court-martial. Affirmed.

8. Use Of Prior Testimony Of Accused Where Case Was Set Aside On IAC Grounds Violated 6th Amendment Right To Counsel.

United States v. Murray, 52 M.J. 671 (N.M.Ct.Crim.App. 2000)

Facts: Contrary to his pleas Murray was convicted of rape, committing indecent acts upon a child, and committing indecent liberties with a child. After trial he fired his civilian defense lawyer. Murray's new defense counsel filed a motion for a mistrial. At the motions hearing the evidence reflected that Murray never admitted to his first defense counsel that he committed the charged offenses. Although Murray had expressed a desire to testify and deny the charges, the defense counsel still pursued a trial strategy that did not contest that the events occurred; the defense counsel offered a sleep deprivation defense. Based on this Murray argued that the defense counsel was deficient in his pretrial preparation and courtroom performance. Although the NMCCA found the first defense counsel deficient, it found no prejudice. The CAAF reversed and found that Murray was prejudiced by his original defense counsel's deficient performance.

At his second court-martial the military judge ruled that Murray's testimony at his original trial was admissible since it was relevant, not hearsay, and not the result of ineffective assistance of counsel. Trial counsel introduced a copy of Murray's testimony from the first trial. Murray did not testify at the second trial. During argument trial counsel commented on the copy of Murray's testimony numerous times. Murray was convicted of attempted carnal knowledge and indecent liberties with a child.

Held: The Court found that the military judge erred by allowing the Government to admit Murray's testimony from the first trial at the second trial. Allowing the Government to use Murray's testimony at the second trial injected the denial of his Sixth Amendment right to counsel into the second trial. Moreover, under the circumstances of this case, the Court found that Murray's decision to testify at the first trial was not voluntary. Ultimately, the Court could not conclude that this error was harmless beyond a reasonable doubt and reversed the findings and sentence because appellant did not receive a fair trial. A rehearing is scheduled in this case.

F. SUBSTANTIVE CRIMES

1. Disrespect Charge Properly Considered Context Surrounding Spoken Words.

United States v. Najera, 52 M.J. 247 (2000)

Facts: Najera was convicted of disrespect by saying to his commanding officer "You can't make me, you can give me any discharge you want, you can give me a DD, I would rather have a dishonorable discharge than returning to training, I refuse." Najera was serving a sentence to confinement because of a prior court-martial. Najera asked his commanding officer for an early release so that he could train with the company. His commanding officer asked the convening authority to release Najera early. The convening authority agreed. After Najera was released he told the first sergeant that he was not going to train. His commanding officer ordered Najera to train and told Najera that if he refused he could get a bad-conduct discharge at a special court-martial. When Najera refused to train he had a smirk on his face when he uttered the words mentioned above. On appeal, Najera argued that since the words spoken were not inherently disrespectful, the evidence was legally insufficient to convict him of disrespect by "language only." Najera argued that since he was not charged with disrespect by deportment, the words themselves had to be inherently disrespectful to constitute an offense.

Held: CAAF held that since Najera spoke the words in a disrespectful manner while smirking and acting cocky, context evidence could be used to establish disrespect by language only. Affirmed.

2. Violation of Sexual Harassment Instruction Was Ultimate Offense.

United States v. Balcarczyk, __ M.J. __, No. 99-1289 (N.M.Ct.Crim.App. 31 Mar 00)

Facts: Balcarczyk pled guilty to nine specifications of violating a lawful general order by engaging in sexual harassment of nine different women. SECNAVINST 5300.26C. Each offense carries a maximum punishment of 2 years confinement. Balcarczyk was sentenced to 18 months confinement, total forfeitures, reduction to E-1 and a bad-conduct discharge. On appeal, Balcarczyk argued that he should have been charged with indecent exposure and indecent language under Article 134 instead because that was the ultimate offense and the underlying misconduct.

Held: The court held that the indecent acts and language was not the ultimate offense because the gravamen of sexual harassment is unwelcome behavior in the work environment. Since this was the gravamen of what Balcarczyk committed against nine different women, it was properly charged as a orders violation that carries a greater maximum punishment than indecent acts or indecent exposure. The court also rejected Balcarczyk's claim of multiplicity finding that the offenses were clearly separately punishable. Affirmed.

3. Urinalysis and Drug Offenses.

United States v. Campbell, 50 M.J. 154 (1999)

Facts: Campbell was convicted of wrongful use of LSD based on a positive urinalysis. At trial, Campbell moved to exclude the results of the urinalysis because of the novel scientific methodology in the testing procedure. The confirmation procedure used the gas chromatography tandem mass spectrometry [GC/MS/MS] test that had never been used in drug urinalysis testing procedures before. In fact, the lab that conducted the test is the only lab in the country that uses GC/MS/MS test to test for drugs. The military judge denied the motion to dismiss. On appeal, Campbell argued that the testing methodology was not sufficiently reliable and that it was error to allow the expert to testify regarding the positive urinalysis.

Held: On its own motion, CAAF specified three issues separate and apart from the granted issue regarding the testing methodology. One of the issues that CAAF specified dealt with legal sufficiency of the evidence. In a 3-2 opinion CAAF set aside Campbell's conviction on legal sufficiency grounds. Over two vigorous dissents, the majority held that a reasonable fact finder could not find Campbell guilty unless the Government can establish the following threshold predicates: (1) reasonably exclude the possibility of a false positive through testimony of an expert; (2) expert testimony that reasonably indicates that the accused at some point would have experienced the physical and psychological effects of the drug. Accordingly, under these facts (testing for LSD using GC/MS/MS), in order to benefit from the permissive inference, the Government must establish:
(1) The drug metabolite is not produced naturally by the body.
(2) The DoD cutoff level is high enough to reasonably discount the possibility of unknowing ingestion such that it is reasonably likely that the user would have experienced the effects of the controlled substance.
The testing methodology detected the presence of the drug and reliably quantified its concentration.

Case dismissed. Note: This case is enormously important as it represents a major shift in how CAAF will approach drug cases based only on the results of a positive urinalysis. The Army Appellate Division requested CAAF reconsider.

United States v. Campbell, 52 M.J. 386, (2000) (on reconsideration) (Campbell II)

Held: CAAF restated the requirement in *Campbell* I that expert testimony must explain the underlying scientific methodology and significance of the test result. However, CAAF also made it clear that the three-part test of *Campbell* I is not a mandatory requirement to prove those factors in all drug cases. CAAF stated that other evidence could be used to demonstrate the reliability and relevance of the tests. In *Campbell*, the deficiency of the expert's testimony centered on the absence of evidence establishing the frequency or margin or error in the GC/MS/MS testing process. CAAF also stated that if the three-part test from *Campbell* I is used to prove wrongful use then the expert testimony on the physical and psychological effects of the drug does not need to be specific to the individual involved, but only to human beings as a class. Case dismissed.

4. Drug Offenses And Multiplicity.

United States v. Ray, 51 M.J. 511 (N.M.Ct.Crim.App. 1999)

Facts: Ray pled guilty to wrongful use of marijuana and wrongful use of methamphetamine, arising from the simultaneous use of the two drugs by smoking a marijuana cigarette laced with methamphetamine.

Held: Affirmed. The Court *en banc* held that doctrine of multiplicity was not even implicated because appellant's conduct demonstrated "two separate and distinct criminal impulses." The Court then cited *Teters* and *Oatney* and concluded that each offense required proof of facts in addition to and separate from the other. The Court effectively overruled *United States v. Montgomery*, 30 M.J. 1118 (N.M.C.M.R. 1989) (*en banc*), specifically noting that *Montgomery* "is no longer good law and should not be followed."

United States v. Heryford, 52 M.J. 265 (2000)

Facts: Heryford pled guilty to wrongful possession of 12 "hits" of LSD, wrongful distribution of 12 "hits" and wrongful introduction of 12 "hits" of LSD. All three offenses were alleged to have taken place at the same place on or about 12 July 1997. At trial both parties agreed that each offense was separately punishable. On appeal, Heryford asserted that his possession of LSD was the lesser-included offense of his wrongful introduction and distribution.

Held: Distinguishing *United States v. Savage*, 50 M.J. 244 (1999), CAAF affirmed because it found that the challenged specifications were not facially duplicative. CAAF made that determination by evaluating the entire record. The stipulation of fact and the providence inquiry indicated the Heryford possessed the LSD at his off-base residence 2 days prior to introducing the LSD on base and distributing it. CAAF reasoned that during those 2 days, Heryford could have used the LSD, distributed it to someone else, or destroyed it, without necessarily having introduced it on base and distributed as charged. Affirmed.

United States v. Ramsey, 52 M.J. 322 (2000)

Facts: Ramsey pled guilty to, *inter alia*, wrongful solicitation of LCpl Rich to distribute 30 to 50 hits of LSD to LCpl Rhynes and conspiracy with LCpl Rich to distribute 30 to 50 hits of LSD to LCpl Rhynes. After pleading guilty, the military judge *sua sponte* asked Ramsey's defense counsel about multiplicity. Defense counsel indicated that the solicitation and conspiracy were multiplicious. The military judge found the specifications to be multiplicious for

sentencing but not for findings. On appeal, Ramsey argued that the military judge erred by not dismissing the solicitation specification as it was facially duplicative with the conspiracy.

Held: CAAF ruled that the conspiracy and the solicitation were not facially duplicative because it is possible to have solicitation without a conspiracy and a conspiracy without a solicitation. In this case, the solicitation was complete when Ramsey solicited LCpl Rich and he agreed, however, the conspiracy was not complete until the overt act occurred, the actual exchange of money and LSD. Because CAAF ruled that the two specifications were not facially duplicative, it did not need to reach the second issue of whether the solicitation to distribute LSD was the lesser-included offense of the conspiracy to distribute because it arose from the same phone conversation. Affirmed.

5. NMCCA Adopts "Born Alive" Standard For Purposes Of Involuntary Manslaughter Of Infant.

United States v. Nelson, 52 M.J. 516 (N.M.Ct.Crim.App. 1999)

Facts: Late in the evening on 28 September 1996, Nelson was on board USS SIMON LAKE (AS 33), located in her home port at La Maddalena, Italy. Nelson had returned to the ship after going into town with some friends. She was not feeling well. Her discomfort was a result of her unplanned pregnancy that she had kept hidden from everyone. While standing between the racks in her berthing area she delivered a full term baby-girl. The baby fell into her jeans, which were down around her knees. Nelson picked up the baby and placed her on one of the racks and then covered her up in a blanket. She cut the umbilical cord with her pocketknife. Although medical personnel were on board SIMON LAKE at the time the baby was born, Nelson did not examine the baby to determine the baby's physical condition nor did she seek any medical assistance.

With the baby on a nearby rack, she cleaned up the natural consequences of the delivery, using sheets to wipe up the floor. She packed a small bag with personal items. She then placed the sheets in a plastic garbage bag and poked some holes in the bag. Without checking on the baby's condition, Nelson laid the baby in the plastic bag with the sheets. She then left the ship, carrying both bags. Some 12 hours later Nelson took herself and the baby to a civilian hospital in Olbia, Italy. She was admitted to the hospital, but the baby was already dead when Nelson arrived at the hospital.

Four days after the baby died an Italian forensic pathologist conducted an autopsy. Also attending the autopsy were the Armed Forces Regional Medical Examiner and the medical officer from SIMON LAKE. A float test was performed on the baby's lungs. The results of this test indicate that Baby Nelson never took an efficient breath of air. It also indicated that the infant

could not have remained alive until just before Nelson took her to the Italian hospital, which she had claimed in a written statement given to NCIS investigators. The autopsy also revealed that the baby was alive while passing through the appellant's birth canal and that the baby had no congenital deformities or defects. Medical testimony revealed that had Nelson sought medical attention or stimulated the baby, she would have lived.

Nelson was charged with the involuntary manslaughter of her daughter "by culpable negligence unlawfully killing her newborn infant female by failing to provide medical assistance to said infant and by failing to take steps to ensure that medical treatment and assistance were available and provided to said infant." At trial, Nelson's principal defense was that given her experiences, intelligence, and actions, her conduct did not rise to the level of culpable negligence. While the military judge did instruct the members that they needed to be convinced that Baby Nelson had been born alive before Nelson could be convicted of either involuntary manslaughter or negligent homicide, Nelson did not contest that issue.

Nelson was also charged with making a false official statement in that she told NCIS that "her baby was alive when she departed USS SIMON LAKE (AS 33) at about 0015 on 29 September 1996, that the baby was alive for several hours thereafter, and that the baby only died shortly before she arrived at a hospital in Olbia, Sardinia, Italy at about 1230 on 29 September, or words to that effect."

On appeal, the Navy-Marine Corps Court was called upon to decide whether the baby was "born alive" for the purposes of Articles 118 and 119; whether Nelson was culpably negligent and whether she made a false official statement.

Held: "If a newborn infant [is] simply capable of existing once fully expelled from the mother, the infant [is] born alive." The infant need not be breathing, so long as it shows any other evidence of life. Whether the infant successfully drew its first breath is not controlling. Thus, this child was born alive. As the parent, Nelson owed a duty of care to her child, which was violated when, after giving birth, she did not check on the condition of the child and then failed to seek medical assistance.

On the false official statement, the Court found that Nelson's statement was official. However, it set aside the findings of guilty with respect to the first clause of appellant's statement because there was no evidence that Nelson knew her baby was not alive when she left the ship. Affirmed in Part. CAAF granted the petition in this case. Oral argument is scheduled on 4 May 2000.

6. Oral Sex Legally Sufficient To Prove Sodomy.

United States v. Green, __ M.J. __ No. 99-0321 (N.M.Ct.Crim.App. 14 March 2000)

Facts: Green was convicted, contrary to his pleas, of sodomy. Hall and four other service members, two men and two women spent the night in a hotel room. After drinking together, the victim and one of the men engaged in consensual intercourse and then they fell asleep. The other woman and her date fell asleep on the other bed. Green sleep on the floor between the two beds. The victim woke up and testified that Hall was performing oral sex on her. On appeal, Green argued that the evidence was insufficient because oral sex does not establish penetration, which is a required element of sodomy.

Held: The court described in detail the definition of oral sex and cunnilingus and concluded that there were enough facts in the record to conclude that penetration, however slight, occurred. The members were instructed that they could only find Hall guilty if they believed beyond a reasonable doubt that penetration had occurred. Affirmed.

7. Proof Of Solicitation Sufficient If Based On Uncorroborated Co-Conspirator's Testimony.

United States v. Williams, 52 M.J. 218 (2000)

Facts: LCDR Williams was convicted of numerous offenses relating to drug trafficking. On appeal, Williams challenged the conviction an allegation of solicitation where the only proof of the solicitation was the uncorroborated testimony of a co-conspirator.

Held: Rejecting Williams's contention that the charge of solicitation was legally insufficient when based only on the uncorroborated testimony of a co-conspirator, CAAF found the evidence to be legally sufficient. Affirmed.

8. A Noncommissioned Officer May Regain His Office After Misconduct.

United States v. Diggs, 52 M.J. 251 (2000)

Facts: Army Staff Sergeant Diggs was convicted of assault, resisting apprehension, and service discrediting conduct. Sgt Vaden was deployed to Bosnia, but his company was unexpectedly recalled to his unit's permanent base in Germany. When he came home he was greeted by his surprised spouse and when he went up to the bedroom and opened the closet, Diggs was standing there naked. Sgt

Vaden struck Diggs a few times out of anger. After Sgt Vaden calmed down he told Diggs they were both going to the MP for Diggs to turn himself into authorities. While Sgt Vaden was waiting for Diggs to get dressed he turned his back and Diggs pushed Vaden out of the way and fled. Sgt Vaden gave chase, but he was unsuccessful chasing Diggs down.

On appeal, Diggs challenged the legal sufficiency of his assault and resisting apprehension convictions. Specifically, Diggs argued that there was no evidence that he was clearly notified that he was in custody. With regard to the assault of a noncommissioned officer in the execution of his office, Diggs asserted that when Sgt Vaden struck Diggs he divested himself from the protection of his office.

Held: CAAF held 3-2 that the evidence was legally sufficient. As to the apprehension, CAAF ruled that a reasonable fact finder could conclude that Diggs was given sufficient notice that he was under apprehension based on all the circumstances. With regard to the assault charge, CAAF refused to find a *per se* divestiture of office. Rather CAAF reasoned that even if a noncommissioned officer or officer engages is misconduct he may regain his status or office. Affirmed.

9. Evidence Sufficient For Knowing Download Of Child Pornography

United States v. Murray, __ M.J. __ (April 6, 2000)

Facts: Murray took his computer to a repair shop. While repairing the machine, the owner of the repair shop discovered a sexually explicit picture of a child and he alerted authorities. The police arrested Murray when he came to claim his computer. Murray admitted that he had child pornography on his computer but claimed that he had accidentally downloaded child pornography when he was downloading adult pornography. Murray was convicted of violating 18 USC § 2252(a)(2) by downloading child pornography off the internet. On appeal, Murray argued that the Government had failed to prove that he "knowingly" downloaded the images; that the Government failed to prove that Murray knew the images traveled in interstate commerce; and, that the Government failed to prove that the images actually traveled in interstate commerce.

Held: CAAF rejected Murray's arguments finding that there was ample testimony from the owner of the internet service provider that Murray knew that the images were worldwide in scope. Additionally, appellant's categorization of images and the fact that he had visited certain types of newsgroups rebutted his claim that he had innocently downloaded child pornography. Affirmed.

10. Evidence Sufficient For Threats To Kill President.

United States v. Ogren, 52 MJ 528 (N.M.Ct.Crim.App. 1999)

Facts: Seaman Recruit Ogren was in pretrial confinement as a result of multiple incidents of misconduct including assault and battery upon a fellow sailor. While in pretrial confinement, Ogren continued to be very abusive, antagonistic, and disruptive. One evening following a random cell search Ogren threatened a female brig guard and her children.

The following day Ogren became furious when brig personnel asked him to sign a counseling form documenting his inappropriate behavior the night before. Ogren repeated many of his threats from the night before, including new threats to another pretrial detainee, and became very disruptive again. Ultimately, Ogren told a brig guard to "fuck off" and said "fuck Chief, fuck the Admiral, and fuck the President." Ogren then said, "if he could get out of here right now, I would get a gun and kill that bastard." Hours later Ogren told another brig guard that he could not wait to get out of the brig because he was "going to find the President" and "shove a gun up his ass" and "blow his fucking brains out." When asked which President he was referring to, Ogren said "Clinton, Clinton man! I'm going to find Clinton and blow his fucking brains out." Ultimately, these threats were investigated by the U.S. Secret Service. Among other things Ogren was convicted of threatening to kill the President in violation of 18 U.S.C. § 871(a). On appeal, among other things, Ogren claimed that the evidence was insufficient to sustain a conviction for threatening to kill the President.

Held: The evidence was sufficient to establish appellant's guilt. In this case, the first military appellate case to interpret 18 U.S.C. § 871(a), the court rejected the reasonable recipient standard with respect to whether an accused's statement is a true threat. The Court adopted a test that examines a threat from the perspective of what the person making the statement should have reasonably foreseen. Thus, the Court held that an accused may be convicted under 18 U.S.C. § 871(a) when he "should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it [was] made." Additionally, the Court recognized that this was a general intent crime. Thus, the person uttering the statement need only make the statement intentionally. Moreover, the fact that the person making the statement was incarcerated was but one fact to consider. Here, the evidence was sufficient because: Ogren's statements were directed at President Clinton personally; he uttered the words "seriously, deliberately, and neither in jest or in response to a particular provocation;" the statements were not spoken in the heat of anger, the statements were separated by several hours; the statements were not political in nature or "truly conditional," and, there was no evidence to suggest that he used the words as a result of a mistake or accident. Affirmed. CAAF granted review of this case in March 2000.

G. MULTIPLICITY AND MULTIPLICATION OF CHARGES

1. Unreasonable Multiplication of Charges Separate From The Legal Concept Of Multiplicity.

United States v. Quiroz, __ M.J. __ (N.M.Ct.Crim.App. 29 March 2000) (*en banc*)

Facts: Quiroz was convicted, pursuant to his pleas of conspiring to wrongfully dispose of U.S. Government property (1.25 pounds of M112 Demolition Charge [C-4]), wrongfully selling the C-4, and of two specifications of violating Section 842(h) of Title 18, U.S. Code, by first unlawfully receiving the stolen C-4, and then by unlawfully possessing, storing, transporting and/or selling the stolen C-4. He was also convicted, in accordance with his pleas, of possessing marijuana seeds, manufacturing marijuana, and possessing marijuana plants in violation of Article 112a, UCMJ. He was sentenced to a dishonorable discharge, 10 years confinement, forfeiture of all pay and allowances, reduction to E-1.

The C-4 that Quiroz was charged with selling under 18 U.S.C. § 842(h) was the same C-4 explosive material he was charged with wrongfully selling under Article 108, UCMJ. The marijuana seeds Quiroz was charged with possessing were the same marijuana seeds he used to manufacture marijuana.

After pleading guilty and prior to sentencing, Quiroz objected to the charges involving the C-4 explosive material as being multiplicious for sentencing. The military judge found that they were not multiplicious. He made no objection to the specifications involving the marijuana.

On appeal, Quiroz again objected to the charges involving the C-4 explosives, but on different grounds. Instead of arguing that the charges were multiplicious, he argued that they were an unreasonable multiplication of charges, citing the Discussion to RCM 307(c)(4), which states that "What his substantially one transaction should not be made the basis for an unreasonable multiplication of charges." Quiroz further argued that the marijuana specifications were both multiplicious and an unreasonable multiplication of charges.

Held: The court sitting *en banc*, based upon a Government request for reconsideration of Quiroz I, 51 U.S. 510 (1999), held that a claim of an unreasonable multiplication of charges is a separate doctrine from multiplicity. While multiplicity is an legal doctrine, unreasonable multiplication of charges is an equitable doctrine. According to the court, the policy is articulated in the Discussion to RCM 307(c)(4), which states, "what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges." The Court further held that claims of unreasonable multiplication are never forfeited by the failure to raise it at trial. Finally, the Court set forth 5 factors used to determine whether multiple specifications represent an unreasonable multiplication of charges:

1. Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
2. Is each charge and specification aimed at distinctly separate criminal acts?
3. Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
4. Does the number of charges and specifications unfairly increase the appellant's punitive exposure? and
5. Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

As to the charges in *Quiroz*, the Court found that there was an unreasonable multiplication of charges because both specifications charged appellant with "selling" the C-4 explosives. Court reassessed the sentence reducing the confinement to 8 years. Affirmed.

H. INSTRUCTIONS ON FINDINGS.

1. Failure To Giver Spillover Instruction Was Prejudicial.

United States v. Myers, 51 M.J. 570 (N.M.Ct.Crim.App. 1999)

Facts: Myers was convicted at a general court-martial, contrary to his pleas, of three specifications of rape and two specifications of forcible anal sodomy of two separate victims on two separate occasions. Both incidents involved "acquaintance rape" scenarios, and the primary issue in each instance was whether or not the alleged victims had consented to the sexual acts with Myers.

At trial, Myers moved to sever the trials involving the two alleged victims claiming that joinder of the separate charges would result in manifest injustice because of the remarkably similar nature of the offenses. The military judge denied the motion to sever, and the subsequent military judge denied Myers's motion to bifurcate the proceedings as well as a request for a spillover instruction.

Held: The court held that the military judge abused his discretion in refusing to give the defense requested spill-over instruction to the members prior to deliberations on findings. In reviewing the military judge's refusal to give a spill-over instruction, the court assessed the judge's understanding of Mil.R.Evid. 413 as it applied to the potential for spill-over of the evidence. Mil.R.Evid. 413 provides that when an accused is charged with a crime involving sexual assault, evidence of any similar acts of sexual assault committed by him or her are admissible and may be used for any relevant matter, including demonstrating his or her "propensity" to commit such crimes. The court recognized that Myers was a case of first impression as it relates to the application of Mil.R.Evid. 413 to separately charged sexual assault offenses in the same case, and opined that Myers was a

"constitutional quagmire" that the drafters of Mil.R.Evid. never envisioned. NMCCA found no reported cases in which Mil.R.Evid. 413 was held to allow one set of alleged sexual assault offenses to show an accused's "propensity" to have committed a different set of alleged sexual assault offenses when both sets of offenses were joined together at one trial. Therefore, the court limited its holding to its finding that the military judge abused his discretion in failing to give the defense-requested spill-over instruction. The court concluded by stating that when Myers's motion for severance and request for a bifurcated proceeding were both refused, his last hope for avoiding prejudicial spill-over was an instruction to guard against spill-over. The military judge's failure to give such an instruction rendered it impossible for the factfinders to not cumulate the evidence in what were remarkably similar offenses occurring five months apart. The danger that one set of alleged sexual assault offenses spilled over and served as proof of the other set of sexual assault offenses, eroded Myers's presumption of innocence. Reversed. On rehearing Myers pled guilty with a pretrial agreement for time served.

SENTENCING MATTERS

A. SENTENCE MAGNITUDE

1. Nothing Prohibits a SPCM From Awarding Fine & Forfeitures.

United States v. Tualla, 52 M.J. 228 (2000).

Facts: Tualla pled guilty to various offenses at a special court-martial. He was sentenced to a bad-conduct discharge, confinement for five months, reduction to pay grade E-2, forfeiture of one-third of his pay per month for six months, and a fine of $996.60, with provision for further confinement of one month if the fine was not paid. The convening authority disapproved the fine-enforcement provision. The Coast Guard Court of Criminal Appeals affirmed the findings, but disapproved the part of the sentence that extended to the fine. 50 M.J. 565. The General Counsel of the Coast Guard certified the case to CAAF.

Held: CAAF reversed ruling that the Coast Guard Court of Criminal appeals erred when it held that a special court-martial is precluded from imposing a sentence that includes both a fine and forfeitures. CAAF ruled that nothing prohibits a special court-martial from awarding both. Note: although CAAF declined to rule on the issue, the court did discuss the implications of Article 58b on this controversy; however, since Tualla case precluded application of Article 58b, CAAF declined to rule on the issue other than noting that under the appropriate circumstances a sentence that includes both forfeitures and a fine might run afoul of Article 58b.

B. AGGRAVATION EVIDENCE

1. Proper To Admit Evidence Of OTH Request In Sentencing.

United States v. Vasquez, 52 M.J. 597 (N.M.Ct.Crim.App. 1999)

Facts: During a sentencing hearing at special court-martial for larceny, the Government introduced Vasquez's request for an OTH in lieu of trial by court-martial on an unrelated UA charged. A different convening authority referred the UA charge. The OTH request contained Vasquez's admission of guilt to the UA charge. On appeal Vasquez claimed that the OTH request was not a personnel record within the meaning of RCM 1001(b)(2) and that the record was inadmissible as a statement made in the course of plea discussions. Vasquez also claimed that the convening authority became disqualified from acting in the case due to statement that he made in response to Vasquez's request for a deferment of adjudged forfeitures and reduction in rank.

Held: The Court rejected these claims. NMCCA noted that, while RCM 1001(b)(2) "does not provide blanket authority to introduce all information that happens to be maintained" in an accused's service records, an approved OTH in lieu request was relevant and reliable in sentencing. Additionally, the Court held that Mil.R.Evid. 410(a) did not bar the admission of the OTH request because these statements are inadmissible only when they do not result in a guilty plea or when the plea is withdrawn. Because the OTH request was approved, the underlying charge was no longer a pending charge subject to Mil.R.Evid. 410(a). The Court also found that the convening authority's statement that "any request for deferment, regardless of the circumstances, would not be considered" did not bar him from conducting the post-trial review of Vasquez's case because it was clear that he did consider the request. Rather, the convening authority exercised his discretion and denied the request. Vasquez has petitioned CAAF, but CAAF has yet to rule on whether to accept petition.

C. AGGRAVATION TESTIMONY.

1. Witnesses May Not Smuggle Hearsay Into Evidence Under Guise Of Expert Testimony.

United States v. George, 52 M.J. 259 (2000)

Facts: George pled guilty to communicating indecent language to a 17-year-old girl by writing her a sexually suggestive letter. During the sentencing hearing, trial counsel presented testimony from a social worker. She testified that George's prognosis for rehabilitation was questionable. She explained that the basis of her conclusion was **another** therapist's conclusion that George's actions were predatory in nature.

Held: The Court in a 4-1 opinion held that it was error for the military judge to consider the evidence of future dangerousness on the part of George because of the manner of how the evidence was presented. Although evidence of future dangerousness is permissible under RCM 1001(b)(5) in this case inadmissible hearsay was "smuggled in" under the guise of expert testimony when the social worker explained on direct examination that the basis for her opinion was the opinion of another therapist. However, after evaluating all the evidence, CAAF determined the error to be harmless beyond a reasonable doubt finding no reasonable likelihood that the sentence would have been different. Affirmed.

2. **Witness May Not Vouch For Credibility Of Victim But Not Prejudicial In This Judge Alone Case Where Judge Took Control Of Case.**

United States v. Robbins, __ M.J. __ (CAAF April 7, 2000)

Facts: Robbins was convicted of *inter alia* sodomy of his 7-year-old stepdaughter. To buttress the victim's allegations, trial counsel sought to call Ms. Gilliam, a clinical social worker, to whom the victim and her mother had made statements regarding the sexual abuse. Robbins objected on hearsay grounds. Trial counsel stated that the victim's statements were admissible under 803(4) and 803(6). While attempting to lay the foundation for either hearsay exception, Ms Gilliam related her role as part of the child sexual abuse case review committee. She related that the case review committee evaluates allegations and determines whether allegations are substantiated. Trial counsel asked Ms. Gilliam whether the charges in Robbins's case were substantiated to which Ms. Gilliam responded affirmatively. The military judge eventually concluded that the victim's hearsay statements qualified as an 803(4) exception, but he stated on the record that he gave Ms. Gilliam's testimony little weight.

Trial counsel then sought to introduce testimony from a Ms. Crossley as to what the victim had told her [Crossley] on the grounds that this was admissible as an exited utterance, 803(2). Trial counsel was unsuccessful in laying the proper foundation and the military judge stated he would not consider Ms. Crossely's testimony for the truth of the matter. Trial counsel then sought to admit Ms. Crossley's testimony for the limited purpose of why she did not inform anybody of the allegation of the victim until a week later. As part of the questioning, trial counsel asked Ms. Crossley whether she thought the victim was lying. Ms. Crossley responded that she did not think the victim was lying.

Held: CAAF stated that the appeal was limited to the question of whether the testimony of Gilliam and Crossley amounted to improper bolstering of credibility. Because the questions were not objected to, the Court tested for plain error. Since the case was before a military judge alone, and because the military judge stated that he gave Ms. Gilliam's testimony little weight and

refused to consider Crossley's testimony for the truth of the matter, CAAF found no plain error. The Court distinguished *United States v. Birdsall*, 47 M.J. 404 (1998). Affirmed. Note: Based on dicta in the case, it is likely CAAF may have reversed if this case had been tried before members.

GUILTY PLEA CASES

A. PROVIDENCE OF PLEAS.

1. Plea to Resisting Apprehension Provident Despite Exec Order.

United States v. Pritt, 52 M. J. 546 (N.M.Ct.Crim.App. 1999)

Facts: Pritt pled guilty to, *inter alia*, fleeing apprehension. On appeal, Pritt argued that his plea to fleeing apprehension was improvident because the offense was not punishable until after 26 June 1998 according to the Presidential Executive Order 13,086 which states that an offense "does not apply to acts occurring before June 26, 1998." The Government argued that fleeing from apprehension became punishable on the date that the statute was amended, 10 February 1996.

Held: The Navy-Marine Corps held that absent clear direction to the contrary, a law passed by Congress takes effect on the date of its enactment. Therefore, fleeing apprehension became an offense on 10 February 1996. Affirmed. CAAF granted review of this issue and heard argument in February 2000.

2. Plea To Distribution Provident Despite Fact That Distribution Was To Co-Conspirators.

United States v. Manley,__ M.J. __, No. 98-02195 (N.M.Ct.Crim.App. 2000)

Facts: Manley and various servicemembers made several trips to Tijuana, Mexico, where they purchased cocaine each time. Manley took physical possession of the cocaine and then later distributed it to the individuals who were with him at the time he purchased the cocaine. On appeal, Manley argued that the military judge erred in accepting his guilty plea to the distribution of cocaine, and the "intent to distribute" portion of the specifications alleging introduction of cocaine. Manley asserted that a statutory transfer may not occur between two individuals in joint possession of a controlled substance simultaneously acquired

for their own use. He relied primarily upon *United States v. Swiderski,* 548 F.2d 445 (2d Cir. 1977).

Held: Since CAAF declined a similar invitation to apply the *Swiderski* rationale to a far more compelling set of facts in *United States v. Ratleff*, 34 M.J. 80, 82 (C.M.A. 1992), the court rejected Manley's argument. Furthermore, the Court found *Swiderski* to be factually distinguishable. Affirmed.

3. Plea Of Guilty Waives Any Speedy Trial Issue.

United States v. Bruci, __ M.J. __, No. 98-1793 (N.M.Ct.Crim.App. 29 February 2000)

Facts: Bruci pled guilty to unauthorized absence, wrongful appropriation of a Government vehicle, and larceny. On appeal, Bruci alleged four errors: (1) that he was the victim of unlawful command influence in that trial counsel allegedly committed prosecutorial misconduct by requiring that in exchange for a pretrial agreement Bruci would have to waive his speedy trial motion, in violation of RCM 705(c)(1)(B); (2) that the military judge erred in failing to grant his motion to suppress evidence; (3) that he was deprived of his right to a speedy trial; (4) and, that the evidence was insufficient to convict him of two orders violations.

Held: As to the UCI issue, the court found no evidence that trial counsel had conditioned approval of the PTA in exchange for Bruci's agreement to forego his speedy trial motion. After finding that Bruci did not have a right to plead guilty, the court found that he had not produced any evidence of UCI sufficient enough to shift the burden to the Government to rebut the claim.

On the second issue, the court held that the military judge did not err in failing to suppress the evidence. Bruci stood duty with Cpl Cervantes the night before; while on duty, the wife of another Marine dropped of $10.00 in an envelope which was "chow money." Cpl Cervantes pinned the envelope to the duty board. The next morning the Marine came looking for the money but the envelope was gone. Cpl Cervantes thought first that it might have fallen off the board and into the trash. After searching the trash, Cpl Cervantes went to look for Bruci. He knocked on Bruci's hatch and his roommate answered. Cpl Cervantes saw Bruci's trousers, told the roommate that he was looking for an envelope with money, and asked the roommate if he could take a look in Bruci's trouser pocket. Cpl Cervantes found the envelope which had been torn open; it contained no money. Bruci's theory at trial was that Cpl Cervantes the Duty NCO who stood duty with Bruci the night before was acting in an official capacity and that the evidence should have been suppressed as a violation of the 4th Amendment. The military judge ruled that Cpl Cervantes was not acting in an official capacity, but constituted only a private action.

As to the speedy trial issue, the Court unequivocally held that a plea of guilty waives any speedy trial issue regardless of legal theory, RCM 707, Article 10, UCMJ, or the 6th Amendment.

Regarding the sufficiency of two orders violation alleging the possession and firing of a BB gun. The court found that the evidence was sufficient to establish that Bruci had actual knowledge of the order prohibiting BB guns. Evidence included that fact that Bruci had signed the duty log certifying the had read and understood all orders and the fact that he secreted his BB gun to avoid detection. Affirmed. Bruci has petitioned CAAF, but CAAF has not decided whether to grant the petition.

POST-TRIAL PROCESS

A. SJAR ISSUES

1. Record That Does Not Contain SJAR or Clemency Matters Is NOT Ready For REVIEW.

United States v. Galante, 52 M.J. 676 (N.M.Ct.Crim.App. 1999)

Facts: Galante's record of trial lacked the SJAR, the results of trial and Galante's request for clemency. The convening authority's action stated that he considered the SJAR and Galante's request for clemency.

Held: Despite the fact that the convening authority stated that he considered the SJAR and the request for clemency the Court set aside the sentence and ordered a new SJAR and convening authority's action.

2. Though SJAR Was Deficient, CA Was Informed By Clemency Petition.

United States v. Ohree, __ M.J. __ (N.M.Ct.Crim.App. 23 Feb 2000).

Facts: Ohree was convicted at a contested general court-martial, military judge alone, of conspiracy to distribute heroin, false official statement, and distribution of heroin, and was sentenced to a DD, 5 years, E-1, and total forfeitures. The case arose out of a ring of sailors in Naples, Italy who traveled to Turkey, obtained heroin, and brought it back to Naples. Ohree claimed that: (1) the evidence was factually insufficient to prove that he knew that he was transporting was a controlled substance; (2) the SJAR was deficient for failing to

note that two witnesses against Ohree testified under grants of immunity; (3) the SJAR failed to note the judge's clemency recommendation regarding forfeitures; (4) the sentence was inappropriately severe; (5) Ohree received ineffective assistance of counsel; and (6) a *Gorski* issue.

Held: (1) the evidence was sufficient to prove that Ohree knew that he was being asked to go to Turkey to act as a heroin courier, and that he knew that on his return this bags had been filled with heroin; (2) trial defense counsel's request that the CA suspend forfeitures pursuant to the judge's recommendation, and the CA's express denial of that request, demonstrated that the CA was aware of the judge's recommendation and rejected it; (3) the sentence was appropriate; (4) Ohree did not receive ineffective assistance of counsel; and (5) Ohree may have suffered a violation of the *Gorski* rule, so the Court directed that "appropriate authorities" determine if he is entitled to any money. Affirmed.

3. Failure To Reflect Character of Service Error But Not Prejudicial.

United States v. Ortiz, __ M.J. __, No. 99-0754 (N.M.Ct.Crim.App. 10 Mar 2000)

Facts: Ortiz pled guilty to conspiracy to obstruct justice, false official statements, larceny, wrongful appropriation, adultery, and obstruction of justice. The SJAR indicated N/A as to Ortiz's character of service. Additionally, the SJAR failed to mention companion cases. Ortiz argued that the SJA committed plain error.

Held: Although the court criticized the SJA (mentioning him by name) for his failure to note Ortiz's character of service, the error although obvious did not rise to the level of plain error where Ortiz received a very favorable pretrial agreement. As to the failure to note companion cases, the court held that this requirement based on JAGMAN § 0151a (2), only applies to those companion cases convened by the same convening authority. Affirmed.

4. LDO Officer Authoring LOR Where He is Not Legal Officer Is Not Prejudicial Error.

United States v. Hensley, 52 M.J. 391 (2000)

Facts: Hensley was convicted of larceny and attempted larceny. The convening authority was the CO of USS JOHN PAUL JONES. The ship's legal officer asked LT K. Stampher to prepare a legal officer recommendation. LT Stampher was assigned to the Command Services Office, Trial Service Office West. Hensley did not object the LT Stamper's qualifications to prepare the legal officer recommendation. On appeal, however, Hensley argued that LT

Stampher was not qualified to prepare the legal officer recommendation because he was not the legal officer of the command. The Government conceded before CAAF that it was error for LT Stampher to prepare the legal officer recommendation, however, the Government argued that because Hensley did not object, the error was forfeited.

Held: CAAF held 3-2 that the error did not rise to the level of plain error and Hensley was not entitled to relief. The majority reasoned that because Hensley did not make a showing that he would have received a more favorable recommendation, he failed to prove how he was prejudiced by the error. Affirmed.

INEFFECTIVE ASSISTANCE OF COUNSEL

1. Possible IAC For Failing To Call Requested Expert.

United States v. Grigoruk, 52 M.J. 312 (2000)

Facts: Army Staff Sergeant Grigoruk was charged with sexual molestation of his stepdaughter. Grigoruk wanted the convening authority to employ Dr. Underwager, a child psychologist, as an expert witness for the defense. According to Girgoruk's proffer, Dr. Underwager was going to give testimony on how children are prone to give false testimony because of particular family situations such as divorce. The convening authority denied the request. Grigoruk made a motion before the military judge and the military judge ordered the Government to produce Dr. Underwager or a suitable substitute. Grigoruk's defense counsel never called Dr. Underwager or any other doctor. The testimony consisted of Grigoruk's stepdaughter testifying about the sexual abuse, but there was no medical evidence supporting abuse. Grigoruk denied anything happened. After he was convicted, he asked his defense counsel why Dr. Underwager was not called to rebut the allegations of the stepdaughter. Defense counsel explained that he did not call Dr. Underwager because trial counsel had evidence that would make the doctor look like a hired gun. On appeal, Grigoruk asserted that his defense counsel was ineffective for not calling Dr. Underwager or some other defense expert to rebut the allegations of his [Grigoruk's] stepdaughter.

Held: CAAF held 4-1 that Grigoruk had met the threshold requirement of demonstrating ineffective assistance of counsel for failing to call Dr. Underwager as a defense expert. CAAF reasoned that because this was essentially a swearing contest between Grigoruk and his stepdaughter, there was enough to call into question defense counsel's failure to call Dr. Underwager or any other defense expert. Accordingly, CAAF remanded the case to the court of criminal appeals to obtain additional evidence including an affidavit from trial defense counsel explaining his failure to call a defense expert. Reversed.